SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

v.

CHELTENHAM & ABINGTON SEWERAGE COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Pennsylvania Supreme Court in the decision here sought to be reviewed held that because the rates involved were collected pursuant to a tariff approved by the Commission on July 1, 1931, which was not invalidated by Commission Order until August 30, 1935, the Commission lacked power to award reparations for any portion of that period. The sole Federal case cited as authority for so holding is **Arizona Grocery Co. v. Atchison T. & S. F. Railway Co., 284 U. S. 370 (1932).**

We submit that the Arizona Grocery Company Case is clearly distinguishable from the case at bar.

In the Arizona Grocery Company Case the Interstate Commerce Commission in 1921 reduced rates on sugar from California points to Phoenix, Arizona from $1.045 to 96.5c per 100 lbs. The carrier subsequently made voluntary reductions to

84c. In 1925 the Commission prescribed a rate of 71c for the future and thereafter, in 1929, declared that all past rates were unreasonable to the extent that they exceeded 71c. Reparations were awarded from 1922 on the 71c basis. The carriers refused to pay the reparations awarded, and the shippers sued and recovered therefor in the Federal District Court. The Circuit Court of Appeals reversed the District Court, and that judgment was upheld by this Court. In the course of its opinion this Court stated (284 U. S. 390):

> "Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

In the present case, the Commission did more than approve specific rates for certain of the utility's services; it prescribed the allowable gross annual revenue which the utility might collect for all of its services and later approved the tariff prepared by the company and purporting to provide such revenue. Thereafter, collections made in accordance with the said tariff, to the certain knowledge of the utility, produced revenues in excess of those permitted by the Commission, and the Commission held the utility liable to make reparations for a portion of such excess collection. The Commission here did not attempt to declare a previous finding of reasonableness erroneous as did the Interstate Commerce Commission in the Arizona Grocery Company case. The basis of the Commission award of reparations here is not that the utility had collected more than the Commission should have permitted it to collect, but that the utility had collected more than the Commission actually permitted it to collect, namely, $36,140 annually.

Petitioner does not seek a change in the so-called "Commission made rate" rule established by the Arizona Grocery Company case, but seeks to determine its proper application. The position of petitioner is that where a Commission has determined allowable over-all revenues and later has approved a tariff submitted by the utility as calculated to yield such revenues, the total revenues permitted by the Commission, and not the tariff should be considered the "Commission made rates."

The reasons for this position are plain and cogent. The adjustment of the general revenue level to the demands of a fair return is the result of careful study and research by the Commission, arrived at only after full and extensive hearings and after a thorough and comprehensive review of the record. It represents the considered judgment of the Commission as to the total amount the utility should be permitted to earn in view of the value of property, its operating expenses, and the return due its investors. The full experience of the utility is available to the Commission in making a determination of proper future revenue allowances.

On the other hand, the approval of a rate schedule prepared by the utility and purporting to conform to the general revenue level prescribed by the Commission can be at most only a tentative expression by the Commission that its limitation on over-all revenues seems likely to be observed. At the time such approval is given, the Commission is able only to estimate that the filed tariff will produce no more than the permissible revenues since the results depend upon future conditions which can only be surmised. All of the elements which make for certainty when the Commission, at the conclusion of a rate proceeding, sets a general revenue level are absent when the Commission is called upon to approve the reasonableness of a company tariff purporting to attain the revenue level.

In view of these essential differences in the character of the two Commission actions here involved we strongly contend that the utility should be bound by the former and that the latter should not be considered a legislative act of the Com-

mission upon which the utility is entitled to reply. It is contrary to logic and sound regulatory practice to permit a utility to rely upon a Commission finding which is incapable of certainty and at the same time to ignore a Commission finding on the same subject which represents an accurate and intelligent determination of the matter involved. It is submitted that the Commission obviously did not intend its approval of the tariff to supersede its earlier finding of maximum allowable revenues and consequently there is no reason to hold that the award of reparations was a retroactive repeal by the Commission of its own legislative act as to the reasonableness of the rate it had fixed.

It is petitioner's position that the only time the Commission fixed reasonable rates in this case was when it prescribed the maximum over-all revenues of the utility. Its action in approving the utility's tariff was merely a permission to the utility to place the rate schedule in effect as the legally collectible rates of the company and decided nothing whatever with respect to their reasonableness. See **Suburban Water Co. v. Oakmont Borough,** 268 Pa. 243 (1920).

The utility was entitled to collect only the total amount fixed by the Commission and all collections in excess of that amount were unreasonable. An award of reparations in the amount of the excess represents purely the return of money to which the utility had no right under the Commission action.

Wherefore, petitioner prays that your Honorable Court will issue a writ of certiorari to review the final decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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